INTER-STATE COMITY AND DOUBLE TAXATION

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No doubt there is a touch of cynicism in the suggestion, but the statement seems warranted that the standard of morality of the community is lower than that of the individuals who compose it. Lives have been sacrificed and the privileges of liberty violated, when a supposed national honor could be invoked, as a veil to hide a national expediency. The perception of the right of property frequently acted upon by communities of men has been that the alien's right to his possessions was measured by his strength to retain them.

With the progress of civilization men and nations have raised the standard of their morality but it is true to-day as it has been in the past, that national morality is below that of the people who constitute the nation, and this statement will probably remain true to the end of time.

For those who doubt the validity of this assertion, it may be well to point the reasons upon which it is founded. The code of morality for the individual is established by his religion and his law. The precepts are definite and their violation is followed by the bailiff, the prison and the stigma of popular reprobation. The ten commandments and the bill of rights are vital forces, and he who ignores them finds himself isolated, with none to defend him, and opposed to the solid front and unyielding antagonism of his fellow men. The same forces do not act upon nations. Neither the fear of punishment nor of adverse public sentiment has been a factor in their education toward an uplifting of the national morality. The responsibility for national acts of injustice is usually divided among many individuals and focused upon

none. Resentment of such acts comes from another people. The benefited community remains complacent and forgiving, with pride in the enterprise of their government, with satisfaction at the gain or benefit to themselves, but with ears that are deaf to the complaints of an alien community claiming to have been ill-treated. Men, from inclination or compulsion, are just. Nations are expedient.

When the thirteen States that had, with difficulty, been held together by the necessities of a common danger emerged from the war of the revolution, their national jealousies revived and it required the work of patient, brilliant statesmen, assisted by the recollection of weakness against a common enemy, to reconcile the jarring interests into sufficient harmony so that a union could be established. But the work was done. The constitution was adopted. Its adequacy has been proven by the test of time. Under it we are a nation as against the world, for the word of the united government is law to the States in war and in diplomacy. We are a nation as to commerce, for the assumption by the national government of control of interstate commerce has practically compassed all commerce. But for taxation the States remain where they were in 1780, jealous, warring and independent. By the constitution, the States surrendered power to tax imports, commerce and the instrumentalities of the federal government. Otherwise, they remain free. Later, when the principles of Magna Charta were incorporated into the constitution the States were prohibited from using the power of taxation to confiscate. Subject to these exceptions, each State may lay its iron hand upon all men and all things with its jurisdiction.

This proposition no doubt seems eminently fair and proper. The State may tax that which is subject to its jurisdiction.

It is natural that such a statement should be accepted as valid in economics as it is in law. But those who accede to it as expressing a fair rule for adjusting, as between the States, the burden of taxation, fail to appreciate that a tax is a taking of value; that the State where the value is situ-

ated is the only jurisdiction that can justly tax it, and as a sound legal proposition, jurisdiction to tax the value frequently exists where the State has power to coerce payment but where the value on which the tax is computed is beyond the State's control.

The difficulty of the situation lies in this fact that on the one hand the only sound method of apportioning property taxes and taxes on persons or privileges measured as to amount by property, is to find where the value lies and to recognize that the same value cannot support two taxes; and, on the other hand, a single value may have engrafted upon it many property rights and recognized legal interests existing in many places and in various ownerships, each one of which may serve as a foundation for legal jurisdiction and thus burden the same value with a levy of many taxes.

Many instances may be referred to as illustrative. The jurisdiction of the domicile of a person lays hold of the control of the person to enforce personal taxes measured by the value of his property. The jurisdiction where many kinds of personal property may be situated claim successfully that the *situs* of the property gives jurisdiction regardless of the domicile of the owner. There is here a grave chance for conflict of jurisdiction and double taxation. Again, money or property is loaned by one person to another. The State in which the creditor resides claims, with considerable justice, that the value which the loan represents exists as belonging to the creditor; it is an asset in his hands and he is liable to taxation for it. But the State where the debtor lives, with some plausibility, argues that the claim is of value only as it can be enforced and the creditor can enforce it only by invoking the laws of that State to compel payment, therefore the value exists in the State where the debtor resides. Both of these theories may be safely acted upon by any State without fear that a statute for taxation will be held to violate constitutional limitations and it is thus true, as a practical matter, that control either of a creditor or a debtor gives to a government the power of coercion to enforce payment of the tax. The case is that of a single value

subject to the taxing jurisdiction of two states. Perhaps the most complex multiplication of the power of taxation upon a single value is to be found in the case of a business corporation, because of the artificiality of the divisions of ownership which are usually involved. A business plant exists consisting of the real and personal property of a factory for manufacturing a product, business good will or franchise and the accounts due from customers for sales of the product. The ownership of the corporation is represented by shares of stock distributed among residents of different taxing jurisdictions and a part of the funds with which the corporate plant was purchased is represented by bonds also widely distributed and held by the citizens of different States. In this case the value is the worth of the property of the corporation and that only. That value is the limit of just taxation. Yet the issue of various classes of securities against that value serves as a foundation for multiple taxation. The corporation may be taxed upon its real and personal property including its franchises. The shareholders may be taxed upon the value of their shares. The bonds may be taxed as credits in the ownership of the bondholders and they may even be treated for taxation as a kind of tangible property, which is capable of passing by delivery like money or commercial paper, and, therefore, capable of having a *situs* for taxation. at the place where they are situated, regardless of the domicile of the owner. It is also an elementary rule of law that the deduction of indebtedness is a privilege which may be granted or withheld in the discretion of the taxing power. The State may thus tax the property, the stock and the bonds and may compel payment of taxes from the corporation and the holders of its securities without giving credit for indebtedness incurred in acquiring title to the thing taxed and then may tax the debt as a part of the assets of the creditor. In other words, every artificially created interest in property may be treated as property for taxation and thus a single value is made to bear many times its fair share of the burden of taxation.

Another example of multiple taxation, sanctioned by valid legal principles but operating as an unjust and unscientific

discrimination is the taxation of real property and also mortgage debts, which, in fact, must be satisfied out of the value of the property upon which the mortgage is a lien. The logic of the legal theory which permits this is unassailable. In case of a mortgage the real property is collateral security only; the mortgage represents a transfer of money from the creditor to the debtor and presumably this money will be repaid without involving the real property but leaving the collateral untouched and the value of the real property unaffected by the debt. But usually the fact differs from the legal presumption. The money borrowed is used as a part payment for the real property or increases the value of the collateral because it is used in payment for improvements. Thus the debtor does not, as in the case of an ordinary loan of money, retain a fund belonging to the creditor consisting of personal taxable property against which an offset of indebtedness may be allowed, which adjusts the account fairly and independently of the real estate pledged as collateral. On the contrary, the usual mortgage transaction consists of lending the money to the mortgaged real property rather than to its owner and the parties to the transaction expect the real property, not the owner, to pay the interest and liquidate the debt. The loan is not in fact made upon the credit of the borrower nor would that consideration be sufficient in case of a loan which continues regardless of changes in the borrower's financial condition, which matures at a remote time and is in form such that the borrower's personal estate can be held for the debt only secondarily to the liability upon the property and only to the extent that the property fails to realize sufficient value to pay the debt in full. It seems strange that the law of taxation fails to accord with the fact and substance of so ordinary a transaction.

One of the most iniquitous of the modern methods of taxation, founded upon jealousy or greed and operating as a hostile discrimination against the people of other States, is the system of using the power to exclude nonresidents or to impose conditions upon their doing business within a State in order to draw within the jurisdiction property which otherwise would be wholly beyond the power of the State to tax

If we have the eyes to see and the honesty to appreciate, we will acknowledge that the business of the people of this country is either done in corporate form or directly dependent upon the existence of corporations. This is by no means confined to the larger enterprises, which may or may not have become a proper subject of disapprobation, but it is true of the small businesses in which a few or even a single individual may be engaged. A franchise to be a corporation has for years been almost as free as the air we breathe and could be had from any state for a nominal fee and otherwise merely for the asking. The immense advantages of conducting business in corporate form have been recognized generally and the privilege has been availed of by large and small alike — in fact, by almost all people who had business to conduct if any capital was needed in the undertaking. But whenever a corporate form has been assumed the business has lost the protection it would have had if conducted by an individual. A corporation has no citizenship, and any state may exclude from its territory a corporation existing by the law of another state. The power to exclude carries with it the power to impose conditions of admission and these conditions take the form of requirements to pay licenses or taxes measured by the whim of the government which imposes them. In this era of quick communication and transportation business cannot confine itself within the narrow limits of a state. Merchandise is bought and sold, trade is extended without thought of the artificial state boundaries over which the railroads and the telegraph pass unhindered. The result is that the business of the people of each State is being carried into many other States and this condition is economically normal and profitable to the country. It creates, however, an opportunity for oppression under the guise of taxation which is discriminatory and in many cases intolerable. Each State has power to impose such tax burdens as it pleases, and the taxes need not be uniform nor in fair comparison with the taxes upon residents, nor need they bear any relation to the benefit given by the government which exacts them. The only limit is the natural one that if the burden becomes too

intolerable the non-resident corporation will withdraw from the State and cease to do business there. But there is a wide field for discrimination and unfairness — a wide opportunity for oppression before this limit of endurance is reached, and we have to-day in this country the spectacle of each State piling upon the business industries of every other state a weight of license fees and taxes unrestrained by principles of equity or uniformity. And each State in turn is goaded to greater excess in burdening the business of so-called " foreign corporations " by the fact that other States are correspondingly unfair to its own industries. It is curious that in this manner the natural principles and restraints of fair taxation should so far have broken down, but the fact exists, and the resulting evil is a grave condition to be reckoned with in our future economic development.

It must be acknowledged that the question of what is the ideal theory of apportioning the burdens of government upon persons and property is a question involving a wide range of discussion and diversity of opinion. It presents a subject for economists and statesmen to deal with and the governments of the various States may properly solve the problem for themselves in the light of local conditions, the temper of their people, the character of the property and the industries within their borders. No inflexible rule of taxation can be dictated to the States of this Union either by constitutional amendment or by an appeal to the doctrine of comity. It must be expected that the States will continue to trade upon the superiority of natural advantages and to exercise the full power of their jurisdiction to impose a minimum of burden on their citizens without overmuch concern for the people of other States who fall within the burdens of their power or are indirectly injured by the methods of taxation which they establish.

But there are certain underlying axioms of fair taxation which can be phrased with sufficient accuracy to compel a general acquiescence, and a strong appeal can be made to the states to conform to those rules in deference to a fair treatment of their neighbors. The weakness of this appeal is that it cannot be enforced by law. The strength of it lies in the

fact that the States of this country are learning to be generous friends and there is a quality in the character of the people which insist on modifying local rivalry to the extent which is rendered necessary by the principles of fair play.

When taxes are upon property and measured by the value of the property, it is not fair that the same value should be taxed more than once for the same taxing period.

It is no answer to say that the laws violating this principle are constitutional exercises of jurisdiction or that the one state is not responsible to the other.

Where taxes are upon inheritance, it is not fair that the value of the estate should have taxes multiplied upon it by the laws of different jurisdictions and it is as wrong that this should be done by indirection or by invoking the rule that no State is exceeding its jurisdiction, as it would be if two or more States deliberately combined to impose a double tax on some estates and a single tax on others of the same value. When licenses are established for the privileges of doing business or exercising franchises the fees payable should be measured by the value of the privileges granted but the power to exclude should not be used to draw within the taxing power of a State property which naturally is taxable elsewhere.

These principles are founded upon honest dealing. The people of each State have a right to insist that the various governments which may hold their property in equal control shall agree as to where the value lies, to the end that no property shall be twice taxed.